Office - Supreme Court, U. S.
FILED
OCT 4 1943
CHARLES ELMORE CROPLEY
CLERK

(13)

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 314.

PAULINE A. SELSER ET AL.,
PETITIONERS,

VS.

CITY OF STUART ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

THOS. B. ADAMS,
1006 Bisbee Building,
Jacksonville, Florida,
Attorney for Petitioners.

CARROLL DUNSCOMBE,
Oughterson Building,
Stuart, Florida,
Of Counsel.

SUBJECT INDEX

Opinions Below 1
Jurisdiction 2
Supplemental Statement of Matters Involved 3
Assignments of Error 7

Argument—

Question I. Did the Amended Bill (R. 1 to 12) State a Proper Case for "Definitive Determination" of Whether Plaintiffs' Properties Were Subject to Past or Future Taxation by the City of Stuart 8

Question II. When During the Pendency of This Suit the Respondent City and a Majority of Its Bond Creditors Filed a Petition for Bankruptcy Composition, Was It Proper for This Suit to Be Consolidated with That Bankruptcy Suit or to Be Continued and Concluded As an Aid to the Bankruptcy Court, in Determining the Fairness, Equity and Legality of the Proposed Composition Plan Pursuant to 11 U. S. C. A., Sec. 403 (e) (1) (6) 19

Conclusion 23
Map 25

INDEX OF CASES

Aetna Life Ins. Co. vs. Haworth, 300 U. S. 227, 81 L. Ed. 617, 57 S. Ct. 461, 108 A. L. R. 1000 8
Bramley vs. Miller, 276 N. Y. S. 812, 132 A. L. R. 1127 15
Borchard, 1st Edition, pages 94, 97 15
Borchard, 1st Edition, pages 183, 351, 552, 558, 560, 568 ..... 15, 16, 17
Borchard, 1st Edition, pages 601, 611, 619, 620, 621 ..... 16, 17
City of South Miami vs. State, 140 Fla. 740, 192 So. 624, 626 10
Forbes Pioneer Boat Line vs. Bd. of Com'rs of Everglades D. Dist., 258 U. S. 338, 339 4

Freeman on Judgments, 5th Edition, Volume 1, page 1100 13
Great Lakes B. & D. Co. vs. Huffman, 87 L. Ed. (adv.) 1021 ..... 9, 14, 15
Green vs. City of Stuart, No. 313 ..... 3, 7, 17, 20
Hughes vs. Town of Davenport, 193 So. 291 14
Johnson City vs. Clinchfield R. Co., 163 Tenn. 332, 43 S. W. 2d 386 17
Kelley vs. Everglades D. Dist., 87 L. Ed. (adv.) 1091 20
Morin vs. City of Stuart, 111 F. 2d 773 ..... 1, 14, 15
Mahood vs. State, 101 Fla. 1254, 133 So. 90 ..... 11, 12
N. C. & St. L. Ry. vs. Wallace, 288 U. S. 249, 262 ..... 6, 8
Ocean Beach Heights vs. Brown-Crummer Inv. Co., 302 U. S. 614, 82 L. Ed. 478 11
Robinson vs. Jones, 14 Fla. 256, 260 10
State vs. City of Stuart, 120 So., text 339 ..... 3, 5, 10, 12, 14
Stewart Dry Goods Co. vs. Lewis, 287 U. S. 9, 77 L. Ed. 136 14
Supreme Tribe of Ben Hur vs. Cauble, 255 U. S. 356, 65 L. Ed. 673 13
St. Francis Levee Dist. vs. Kurn, 98 F. 2d 394 21
Town of Tallassee vs. State, 206 Ala. 169, 89 So. 514, 20 A. L. R. 1127 13
Utley vs. City of St. Petersburg, 107 Fla. 6, 144 So. 58 4
11 U. S. C. A., Sec. 403 (e) (1) (6) 19, 23

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 314.

PAULINE A. SELSER ET AL.,
PETITIONERS,

VS.

CITY OF STUART ET AL.,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The opinion of the Court of Appeals is in the record, pages 38 to 40. The opinion of the district court is in the record, pages 20 to 22. Both opinions follow the prior decision of the Court of Appeals in *Morin* v. *City of Stuart*, 111 F. 2d 773, which was a bill seeking to *enjoin* the collection of taxes. Both courts could see no substantial dif-

ference between such a suit to enjoin the collection of taxes levied on extended but now excluded areas and a declaratory judgment suit seeking merely a "definitive determination" of whether the plaintiffs' properties were any longer subject to taxation by the city now existing in contracted limits. Therefore the result was a decision by both courts holding that the prior decision in the Morin injunction suit was controlling. The opinion in this particular case is reported 135 F. 2d 211.

JURISDICTION.

The jurisdiction of this court as set up in the petition, page 5, is invoked under Title 28, U. S. C. A., Sec. 347, and Rule 38 of this court. The brief for respondents raises a doubt as to whether this case was docketed one day late. Since receipt of respondents' brief the clerk of this court advises us that this case was actually docketed August 31st. Therefore it is in due time.

The jurisdiction of the district court was invoked under 28 U. S. C. A., Sec. 400, and Rule 57 of the Rules of Civil Procedure. The crux of this case is jurisdictional. The several questions stated pages 6 and 7 of the petition may be resolved into one basic question:

> **Did the Last Amended Bill** (R. 1 to 12) **Present a Case Entitling the Plaintiffs to a "Definitive Determination" with Respect to Taxes Claimed Against Their Properties by the City Pursuant to the Procedure Defined by the Federal Declaratory Judgment Act?**

We think both courts below misconstrued the bill and misapplied the basic principles involved in the Declaratory Judgment Act. The brief filed for respondents merely reiterates the conclusions found in the opinions below. In these circumstances it appears that some additional

statement of what the bill involves may be necessary by way of supplement to the statement contained in the petition.

SUPPLEMENTAL STATEMENT OF MATTERS INVOLVED.

So many special acts affecting the City of Stuart are cited in the record that we have prepared and attach hereto a map of the northeast corner of Martin County, Florida, which includes the City of Stuart. The court may take judicial notice of the special acts involved and the descriptions therein as also the geography of that part of Martin County. Therefore the map hereto attached is a legitimate aid to the record now on file.

The shaded area on the map represents the old Town of Stuart as created by Chapter 7245, Laws of Florida, 1915, and containing about 640 acres, being all of Sections 4 and 5 not in the water of St. Lucie River which bounded the town north and west. See decision of the Supreme Court of Florida in *State* v. *City of Stuart,* 120 So., text 339. The line on the map represents the boundary described in Chapter 11750, Acts of 1925, and included about 9,460 acres as stated by the Supreme Court, 120 So., text 339. The decision of the court rendered in January, 1929, declared that the Acts of 1925 were void as to the extended areas particularly the area north of St. Lucie River. That was a quo warranto proceeding in which a judgment of ouster was issued. In the meantime taxes had been levied on all of the ousted areas to support $500,000 of bonds issued in 1925 for various purposes and validated by Chapter 11749, Acts of 1925. Those bonds and the original $100,000 of bonds issued by the Town of Stuart are the subject-matter or part of the subject-matter of the bankruptcy composition plan now involved in the companion suit of *Green* v. *City of Stuart,* case No. 313, now pending before this court.

At the 1929 session of the Legislature Chapter 14408 was passed redefining the boundary of the city by leaving out the long point known as Sewell's Point appearing on the map between the St. Lucie River and Indian River, also leaving out the southern part of Sections 26 and 27 and part of 28 but otherwise including the same area described by Chapter 11750, Acts of 1925. This Act of 1929 was in defiance of the late decision of the Supreme Court of Florida, 120 So. 335. The court had held that the inclusion of such areas as those north of the St. Lucie River and elsewhere were not under the facts pleaded within legislative power. Therefore the Act of 1929 was just as void as the Act of 1925. What cannot be authorized cannot be ratified. *Utley* v. *City of St. Petersburg*, 107 Fla. 6, 144 So. 58, text supporting the third and fourth headnotes. In the case of *Forbes Pioneer Boat Line* v. *Board of Commissioners of Everglades D. Dist.*, 258 U. S. 338, 339, Mr. Justice Holmes, delivering the opinion of the court, said:

> "Generally, ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act."

By Chapter 15492, Acts of 1931, the Legislature drew in the boundaries to the dotted line on the map hereto attached. Those boundaries left out everything north of the St. Lucie River except a part of Section 32 and everything south of the east and west center line of Sections 8, 9 and 10, and everything east or near the north and south middle line of Sections 10 and 3. Section 2 of the Act of 1931 required that all lands included in said Chapter 14408, Acts of 1929, not included in the Act of 1931 should remain liable for taxes levied during the time said lands were within the city limits. That presupposes, however, that such lands had at one time been within the constitutional limits of the city as defined by the decision of the Supreme Court of Florida.

Chapter 16692, Acts of 1933, was a complete new charter act and the boundary defined therein was the same

as the Act of 1931 and is still represented by the dotted lines on the map.

The Selser property (R. 9) is in the extreme southwest corner of the city as bounded by the Act of 1933 and the Act of 1931. See letter "S" in the circle on the map. The Van Slyck land is in Section 2-38-41 (only the section number was omitted in R. 10). That property was included by the Act of 1925, adjudged by the Florida Supreme Court to be void and by the Act of 1929 which was void for the same reason, but that particular property was out of the city limits as described by the Act of 1931 and out as described in the new charter of 1933.

The approximate location of the Van Slyck property is shown by the letter "V" in the circle on the map.

The Gosling property (R. 11) is in the north part of Section 32, Township 37 South, Range 41 East. It was within the limits of Chapter 11750, Acts of 1925, and within the limits of the Act of 1929, but not within the limits defined by the Act of 1931 nor the Act of 1933. It is further shown (R. 11) that after the Supreme Court decision the taxing officials of the city failed and refused to so authenticate the tax rolls for properties lying outside of the city as defined by the Act of 1931, as to authorize the collection of such taxes. Nevertheless by Chapter 18867, Acts of 1937, the Legislature undertook to supply those fatal requirements and validate all such levies on excluded areas for the years 1931 to 1936, both inclusive. By Chapter 20139, Acts of 1939, the Legislature did the same thing except attempted to make the validation operative on all levies for such outlying areas for 1931 to 1938 both inclusive. Thus for 12 years neither the Gosling property nor the Van Slyck property has been within the city limits as defined by the Acts of 1931 and 1933. Besides which the decision of the Supreme Court of Florida in *State* v. *City of Stuart, supra,* was that those areas were never constitutionally included within the city limits by said Acts of 1925 or (for the same reason) the Act of 1929. Under the decision in the Forbes Pioneer Boat Line case

above quoted the attempted validating Acts of 1937 and 1939 were inoperative. Nevertheless the city still claims the right under said purported validating acts to collect delinquent taxes on the lands of Van Slyck and Gosling and the lands of other owners in the same areas.

As to the Selser property now in the extreme southwest corner of the city limits the bill (R. 9 and 10) shows that facts similar to those shown in *State* v. *City of Stuart, supra,* entitle Selser to a decision freeing that property from city taxes even though still within the defined limits of the city.

> The prayer of the bill (R. 12) is that the court will "adjudicate the rights and liabilities of said parties in regard to the subject-matter hereof * * * and if it finds the taxes alleged to have been levied by respondent City of Stuart were unlawfully levied then to declare such tax liens void and of no effect."

It will be noted that no injunction is prayed for and no coercive relief of any sort is prayed for. On the contrary, using the language of this court in *N. C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 262,

> "The relief sought is a definitive adjudication of the disputed"

rights claimed by the plaintiffs and the defendants respectively.

The bill also shows (R. 1) that this third bill was filed after the bankruptcy composition proceeding was filed wherein the defendant Cook claimed to represent the majority of the city's bond creditors. Therefore this declaratory judgment bill was proper not only to get a "definitive adjudication" of plaintiffs' rights against the city and its creditors but it was also proper as an aid to the bankruptcy court in finding out and determining what were proper and available assets of the city for the purpose of passing upon the justness and fairness and le-

gality of the proposed composition plan now involved in the companion case of *Green* v. *City of Stuart.*

ASSIGNMENTS OF ERROR.

The questions propounded pages 6 and 7 of the petition will suffice as a statement of errors complained of. Those several questions will be compressed into the questions hereinafter discussed.

ARGUMENT.

QUESTION I.

Did the Amended Bill (R. 1 to 12) **State a Proper Case for "Definitive Determination" of Whether Plaintiffs' Properties Were Subject to Past or Future Taxation by the City of Stuart?**

Both the courts below answered this question in the negative. They concluded that the will was a collateral attack on the corporate existence of the city and that quo warranto in the state court was the proper and exclusive remedy.

We think it a fair conclusion that the remedy under 28 U. S. C. A., Sec. 400, should not be less efficacious than the Tennessee statute was held to be in the case of *N. C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249, 77 L. Ed. 730, 53 S. Ct. 345, 87 A. L. R. 1191. In that case the railway attacked a state excise tax on the storage of gasoline, claiming that the state statute providing therefor was contrary to the commerce clause and the 14th Amendment. Another statute of Tennessee prohibited the issuance of any injunction against the collection of any state tax. Nevertheless the railway sought to avail itself of the Tennessee declaratory act in order to obtain a decision that the statute was unconstitutional and that the railway was not liable for the tax. A decision was thus obtained on the merits but the railway lost its case because it was decided that the statute was constitutional. In the case of *Aetna Life Insurance Co.* v. *Haworth,* 300 U. S. 227, 81 L. Ed. 617, 57 S. Ct. 461, 108 A. L. R. 1000, the court considered the nature and efficacy of the Federal Declaratory Judgment Act and among other things said:

> "The operation of the Declaratory Judgment Act is procedural only. * * * Exercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies. * * * In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict. * * * Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. * * * it is not essential to the exercise of the judicial power that an injunction be sought."

The late case of *Great Lakes Bridge & Dock Co.* v. *Huffman,* 87 L. Ed. (adv.) 1021, was not cited by counsel for respondents, nevertheless we have taken that case into account and do not find anything there decided which should bar declaratory relief in the instant case. The court reaffirmed the conclusions stated in the Wallace case and in the Haworth case but nevertheless affirmed the dismissal below

> "solely on the ground that in the appropriate exercise of the court's discretion relief by way of declaratory judgment should have been denied without consideration of the merits."

The opinion shows that this conclusion was arrived at because of the Louisiana constitutional provision and the Louisiana statute cited and quoted which prohibited any injunction to restrain the collection of any tax but provided in lieu thereof that the taxpayer might sue to recover what was paid and be allowed a prompt recovery and that pending such suit the money collected should be segregated and held subject to any judgment the taxpayer might recover. This was deemed to be a speedy and adequate remedy provided by state law justifying the non exercise of federal jurisdiction under the Federal Declara-

tory Judgment Act. Relief was not held barred because an injunction was prohibited either by state law or federal law.

In the case at bar the City of Stuart is admittedly insolvent and its petition for composition in bankruptcy now involved in the Green case so states. Therefore if these petitioners pay the illegal taxes against their lands they would have small chance of ever being able to recover the taxes back. The Court of Appeals in the instant case, and in the Morin case previously decided and followed, held that quo warranto was the exclusive state court remedy. Mr. Dunscombe, now of counsel in this case, was counsel for the plaintiffs in the Morin injunction case. Therefore it was to be expected that as soon as the opinion was handed down in the Morin case he would apply to the Attorney General for leave to file a new quo warranto suit by complaining property owners he then represented. He did that very thing but was met by the rule of law prevailing in Florida, which not only requires the consent of the Attorney General of the State to file a quo warranto suit in his name for the State, but also leaves it "entirely in his discretion" whether the State's name and his name may be so used. *Robinson* v. *Jones,* 14 Fla. 256, 260. *City of South Miami* v. *State,* 140 Fla. 740, 192 So. 624, 626. Though it is not in the record the fact is that the Attorney General of the State refused to permit such new quo warranto suit to be filed on the ground that he deemed the original quo warranto suit in *State* v. *City of Stuart,* 120 So. 335, *res judicata,* notwithstanding subsequent attempted validations of subsequent taxes purportedly levied on lands excluded by the decision of the Florida Supreme Court. True the position so taken by the Attorney General is not now part of the record but since the decisions of the Supreme Court of the State have left it entirely in his discretion whether he will permit such suit to be brought or not the pre-

sumption arises that he did not give his consent from the very fact that no such suit was brought following the decision in the Morin case. Therefore as applied to the situation now existing with respect to the properties of these petitioners and others similarly situated the remedy by quo warranto in fact does not exist and has not existed since the original decision by the Supreme Court of Florida above mentioned. The result is that these petitioners and all other property owners similarly situated have been caught between two fires—the Court of Appeals on one side, the Attorney General of the State on the other. Under such circumstances it was an abuse of judicial discretion for the district court to dismiss the bill seeking a definitive determination of petitioners' rights. The question therefore recurs upon the merits of the bill.

Were the Petitioners Entitled to a Determination That After the Decision of the Florida Supreme Court, 120 So. 335, Their Properties Were No Longer Subject to Taxation by the City of Stuart Notwithstanding Chapter 14408, Laws of 1929, Undertaking to Put Their Lands Back in the City and Notwithstanding Chapter 18867, Acts of 1937, and Chapter 20129, Acts of 1939, Undertaking to Validate Taxes Against Their Lands Levied Since the Supreme Court Decision?

The case of *Ocean Beach Heights* v. *Brown-Crummer Invest. Co.*, 302 U. S. 614, 82 L. Ed. 478, was a substantial duplicate of the case at bar except that the bondholders of the town, existing on the west side of Biscayne Bay, took the initiative in trying to enjoin property owners on the east side of the Bay from invoking the benefit of a prior quo warranto judgment of ouster rendered by the state's Supreme Court in *Mahood* v. *State*, 101 Fla. 1254, 133 So. 90. The bondholders did not invoke the declaratory judgment procedure nor did the defendants. Nevertheless the subject-matter was such that a declaratory judgment bill

would have been proper to determine the adverse claims of the parties, filed either by the bondholders or by the property owners. The opinion of this court was in effect a declaratory decree in favor of the taxpayers on the east side of the Bay.

Our supplemental statement above, together with the map attached herto, clearly shows that the properties of these petitioners had been excluded by the decision of the state court, 120 So. 335, just as had occurred in the Ocean Beach Heights case. The bill in the instant case further shows that subsequent acts of the Legislature were ineffective to put plaintiffs' properties back in the City or to validate taxes against the same. It may be conceded that the various acts of the Legislature were sufficient to create at least a *de facto* City of Stuart in the place of the old Town of Stuart either as to the original area described in the Act of 1915 or as to part or all of the area included within the dotted lines and described in the new Charter Act of 1933. It is wholly unnecessary to attack the corporate existence of the city as to either such area. Therefore the essential nature of this case is no more a collateral attack on the corporate existence of the city than were the motions interposed by property owners in the Ocean Beach Heights case. The simple reason is that the attack was previously made on the corporate existence as to such extended areas of the city, and sustained 120 So. 335, just as in *Mahood* v. *State*, 133 So. 90.

The brief for respondents, bottom page 3, argues that the decision of the Florida Supreme Court in *State* v. *Stuart*, 120 So. 352, should have no controlling influence here because there is no allegation in the petition now pending before this court that any of the petitioners were parties to that suit nor that it was a class suit nor that the property of these petitioners described herein was involved in that quo warranto proceeding. The contentions thus made for the respondents are wholly un-

tenable. In Freeman on Judgments, 5th Edition, Volume 1, page 1100, it is said:

> "Thus in quo warranto proceedings on the relation of individual citizens or taxpayers to vindicate public rights, the judgment in a similar previous proceeding involving the same right is *res judicata* though the proceeding was on the relation of different individuals."

For this proposition Freeman cites the case of *Town of Tallassee* v. *State*, 206 Ala. 169, 89 So. 514, 20 A. L. R. 1127. On page 1090 of the same volume Freeman cites the same case in note 13 to support the text which reads:

> "A judgment against it or its legal representatives in a matter of general interest to all its citizens is binding upon the latter, though they are not parties to the suit."

Again, page 956 of the same volume, the Alabama case is cited in the 17th note supporting the text to the effect that in such a proceeding affecting taxpayers generally, all are bound by the results. To the same effect see page 957 and note 3. On page 952 of the same volume, section 436, the author discusses the general topic of "class representation" and in note 17 the Alabama case is cited as a class representation case the same as the case of *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U. S. 356, 65 L. Ed. 673. The basic principle back of all these authorities is that a quo warranto suit is brought by the State as a proceeding on behalf of the general public and on behalf of the particular public in the taxing unit involved. The individual co-relators simply put the proceeding in motion. Therefore as pointed out in Freeman, it is a class suit and any judgment rendered therein becomes *res judicata* not only as to other taxpayers who might have joined as co-relators but as to the taxing entity as well. Therefore the Attorney General of the State is perfectly right in his view that the former decision of the Supreme Court

in *State* v. *Stuart,* 120 So. 335, is *res judicata,* binding upon all of the citizens and taxpayers of Stuart and likewise binding upon the city itself for which reason it is wholly unnecessary to start a new quo warranto case to relitigate the same questions there involved.

On page 2 of the brief for respondents counsel stress the language of the Johnson Act. The district court did the same thing (R. 20-22). This court quoted the Johnson Act in the *Huffman case, supra,* and held that the language thereof was persuasive to warrant a federal court in refusing relief by declaratory judgment proceeding because in that particular case the Constitution and Statutes of Louisiana quoted 89 L. Ed. (adv.) 1023, first column, did provide

"a plain, speedy and efficient remedy."

Here such is not the case for, as we have pointed out, the decision in *State* v. *Stuart,* 120 So. 335, was *res judicata* and the Attorney General in the exercise of his uncontrolled discretion has refused to permit any other similar proceeding to be brought in the name of the State to accomplish the same results. Therefore the remedy by quo warranto is out. Any remedy that might exist by paying the money and then suing the City to recover is also to all intents and purposes out, because the city is hopelessly insolvent. *Stewart D. G. Co.* v. *Lewis,* 287 U. S. 9, 77 L. Ed. 136. In the third place the Court of Appeals in *Morin* v. *City of Stuart, supra,* expressly held that relief in equity by way of injunction was out. Therefore nothing is left which might be available to the petitioners except a definitive determination under the Declaratory Judgment Act. In these circumstances the Johnson Act by its own terms would not apply.

The decision of the Supreme Court of Florida in *Hughes* v. *Town of Davenport,* 193 So. 291, 3rd headnote and cases cited in the opinion, decided January, 1940,

plainly show that the Court of Appeals was wrong when deciding the *Morin case, supra,* and when deciding this case, holding in both cases that quo warranto was the sole and exclusive remedy especially after there had been an ouster judgment in a prior quo warranto suit. It follows therefore that the petitioners, as citizens of other states, are entitled to a definitive determination of their tax liability as sought in this case.

As further supporting the propriety of the bill in the instant case we beg leave to quote pertinent extracts from Professor Borchard's work on Declaratory Judgments, First Edition (1934). We do not have access to the second edition cited by this court in the *Huffman case, supra.*

Borchard, First Edition, pages 94 and 97, says:

> "Principal Functions. * * * (13) to enable public duties and powers to be established without the cumbersome and technical prerequisites of mandamus, certiorari, injunction, prohibition, or habeas corpus."

Page 183 says:

> "Declaration Issued, Notwithstanding Propriety of Other Action. * * * Thus, in Kansas, in trying title to office or public rights, it is not uncommon to sue in quo warranto (or mandamus) for a declaration of rights, a proceeding which the courts apparently consider as an action under the Declaratory Judgments Act."

The second edition no doubt cites the case of *Bramley* v. *Miller,* 276 N. Y. S. 812, annotated 132 A. L. R. 1127. As to public office see also Borchard, page 609.

Borchard, page 552, says:

> "The constitutionality and validity of statutes and ordinances have been raised either by the party deleteriously affected, by the attorney general on behalf of the public, by the city itself in seeking to escape obligations, or by a taxpayer challenging the validity of public action under an unconstitutional statute."

No doubt many additional cases are cited in the second edition to support this text. Page 558 says:

> "It ought to be possible, without undue delay or hampering of the government, to challenge the validity of a tax law or tax assessment thereunder without abusing the injunction for the purpose, and yet without going to the trouble and expense of paying the tax and then suing for its recovery."

Page 560 says:

> "Constitutionality and validity being conceded, the construction and interpretation of statutes and ordinances and the question of their application to the plaintiff is a common quest of declaratory action."

Page 611 says:

> "In some cases, as in the protest against allegedly illegal taxes, injunction is prohibited in principle, the taxpayer having only the option to pay and sue for recovery of the tax or to refuse to pay and have his property distrained or suffer arrest. These crudities constitute an indictment of the procedural resourcelessness of a legal system. * * * The declaratory judgment has shown the way out."

Page 619 says:

> "Taxation. * * * the individual's claims against the administration to immunity from assessments (1) by reason of the nature or situs of * * * the property * * * or (2) because in the actual administration or assessment of the tax there has been actual or threatened illegality or error, *e. g.*, in failing to comply with the statutory or lawful requirements for a valid assessment."

Pages 620 and 621 say:

> "The immunity of the person assessed, because he or his property is without the jurisdiction * * * is commonly claimed by declaration. * * * Attacks upon the * * * failure to comply with the statutory requirements conferring the necessary jurisdiction to tax."

See cases cited notes 157 and 163.

The usefulness of a declaratory judgment suit in manifold tax situations is also well illustrated, for the purpose of this suit, by the case of *Johnson City* v. *Clinchfield R. Co.*, 163 Tenn. 332, 43 S. W. 2d 386, cited in Borchard, First Edition, pages 351, 568 and 601. In that case the city filed a declaratory judgment suit seeking to obtain the construction of a private act amending its charter so as to include adjacent territory, for the purpose of ascertaining the sufficiency of the description and the collectibility of taxes in the added territory. Obviously any affected taxpayer could have filed a similar bill. Such is the bill at bar. The Tennessee court also held in support of the 7th headnote that immediately upon the annexation of the new area the same became entitled

> "to police, fire, and health protection, city school facilities, lighting, garbage removal, street, and sidewalk improvements, etc."

In the case at bar, as held 120 So. 335, none of these were ever provided from 1925 up to 1929 at which time, by reason of the city's large debt and the ensuing depression the city was insolvent. It still is insolvent as shown by the companion case of *Green* v. *City of Stuart*. The bill here also shows that no change has ever taken place in the matter of supplying municipal facilities or improvements as to the properties of any of these petitioners or in those areas, yet the Legislature subsequent to the decision of the Supreme Court of Florida attempted to further subject such unbenefitted areas to the taxing jurisdiction of the city, even after the passage of the Act of 1931 and the new Charter Act of 1933 restricting the city limits as heretofore pointed out and indicated on the accompanying map.

The decision of the Supreme Court, 120 So. 335, made it extremely doubtful whether Chapter 11214, regular session May, 1925, ever went into effect as a new charter for the City of Stuart due to the fact as pointed out by the court that the referendum election was not properly called and held as required by Section 162 of that Act,

but passing that question and assuming that the attempt to hold such an election plus subsequent acts of the Legislature at least created a *de facto* City of Stuart, it still remains that Section 122 of said Chapter 11214 provided among other things this:

> "The Commission shall have power by ordinance to issue and sell bonds of said city for (various purposes) * * * to an amount *not exceeding twenty-five percent of the assessed valuation* of the real and personal property in said City as shown on the assessment roll" (Italics ours).

The opinion of the Supreme Court, 120 So., text 339, bottom second column, points out that after the extended territory was taken in by Chapter 11750, Extra Session, November, 1925, the assessment roll in many instances showed that wild lands in remote areas were assessed in excess of

> "$1,000 per acre and the same was being taxed by the municipality of Stuart to support the city government and for the purpose of paying off indebtedness created by and for the sole benefit of the old municipality."

The bill in the instant case (R. 5) specifically alleges that the only purpose of attempting to annex the wild areas and remote property

> "was in order to make it appear that the said municipal corporation had a basis of credit that would justify the borrowing of said $750,000 and said property was not attempted to be annexed with any idea or intention of benefitting it."

Thus the bill in the instant case couples up with the recital of facts set forth in the decision of the Supreme Court of Florida, 120 So. 335, and shows that there has been no change in the circumstances except that the City is now still more insolvent if such could be the case than it was in January, 1929. Nothing has been done to extend municipal facilities in any of the territories outside of the old 640 acre area. Besides which the City has made no

progress industrially and the court may take judicial notice that its population is about the same as the 2,000 mentioned in the Supreme Court decision, 120 So., text 339, first column. In addition the bill shows here that since the declaration of the present war the restrictions on tourist travel have taken off that source of revenue for the inhabitants of the city. Considering all these circumstances and many others set forth in the opinion of the Supreme Court, 120 So., the bill at bar presents a perfect case for a definitive determination that the legislative acts passed since January, 1929, in defiance of the decision of the Supreme Court of Florida are void and of no effect to encumber the same with taxation purely for the bonds issued under the circumstances alleged.

The latest annotation on the subject of declaratory judgments as applied to various tax situations is found in 132 A. L. R., pp. 1108 to 1146. The following pages of that annotation are pertinent to the instant case:

> "1111; 1127, including *Bramley* v. *Miller*, (N. Y.); 1129, including *Millard County* v. *Millard County D. Dist.*, (Utah); 1130, second column; 1133; 1134, including *Thompson* v. *Williamsburg*, (Ky.); 1136, including *Gwynne* v. *Bd. of Education*, (N. Y.); 1138, first column."

QUESTION II.

When During the Pendency of This Suit the Respondent City and a Majority of Its Bond Creditors Filed a Petition for Bankruptcy Composition, Was It Proper for This Suit to Be Consolidated with That Bankruptcy Suit or to Be Continued and Concluded As an Aid to the Bankruptcy Court in Determining the Fairness, Equity and Legality of the Proposed Composition Plan Pursuant to 11 U. S. C. A., Section 403 (e) (1) (6)?

The institution of the bankruptcy composition proceeding during the pendency of this suit is alleged in the

second amended bill (R. 1). Thomas M. Cook was named as a party defendant on account of his majority representation of bond creditors (R. 2) in order that he might represent the creditor class. Rule 23, Civil Procedure Rules.

The record in the companion case of *Green* v. *City of Stuart*, No. 313, also shows, pages 209 to 211, that the city submitted on June 25th, 1942, an application to enjoin this suit and other suits then pending against the city. On July 2nd, 1942, petitioner Selser (page 200 of that record) filed an answer to that application of the city setting forth that

> "no one knows what property can lawfully be taxed to pay the bonds proposed to be issued under the plan herein sought to be confirmed and only a judicial decree can fix such liability."

That answer concluded also with this allegation:

> "this Court cannot determine whether said composition plan is fair and within the ability of the petitioner to pay."

Selser *et al.* also sought to intervene in the Green case. See pages 216, 217 of that Record. Both the answer and petition of Selser *et al.* were overruled. The right of such property owners to be heard in that bankruptcy proceeding was one of the matters presented by the petition in the Green case, No. 313, now pending here.

Question No. VIII of the petition in the Green case, beginning page 26, presented this pertinent matter, namely that it was the duty of the district court to make proper investigation and then set forth proper findings in its decree as to what property was subject to taxation to support the proposed refunding bonds to be issued in pursuance of the proposed composition plan. We cited the late decision of this court in *Kelley* v. *Everglades Drainage District*, 87 L. Ed. (adv.) 1091, as the principal authority

in support of that proposition. We again pointed out under Question XI of the petition in the Green case, page 35, that until the court investigated and determined what assets and resources the city had wherewith to finance the proposed refunding bonds it would not be possible for the court to determine that the proposed composition plan was within the legal competency of the city. We cited again the Kelley case, also the Avon Park case, in connection with that proposition. We also cited the opinion of the Eighth Circuit Court of Appeals in *St. Francis Levee District* v. *Kurn,* 98 F. 2d 394, for the proposition that a court of bankruptcy has ample power to determine the validity of any tax claimed against the estate in bankruptcy and also to take such proceedings as may be necessary to enforce the same. Based upon such authorities it is our conclusion that the bankruptcy court brought here for review in the Green case must of its own account or through some ancillary proceeding such as the Selser case determine what are the legal assets of the City of Stuart before the proposed plan of composition or any other such plan can be given approval as contemplated by the amendment to the Bankruptcy Act. It is perfectly obvious that if a municipality upon the confirmation of any such proposed plan is still greatly insolvent because of the disproportion between its debts and its available assets then the time of the bankruptcy court in considering such a plan has been wasted. It is one of the principal concepts of the municipal bankruptcy amendment that the court will carefully investigate the ability of the municipality or other taxing unit to pay, and when so found the court may then advisedly confirm a plan of composition that will be in keeping with such ability to pay. The determination of such ability was one of the very purposes of the Selser declaratory suit. The court, in the bankruptcy proceeding, must know whether the 640 acres referred to by the Supreme Court of Florida, 120 So., text 339, is the only available asset or whether all outlying

areas included in Chapter 11750, Special Acts Extra Session, 1925, making up 9,460 acres are the available assets.

We find that we may again turn to Borchard on Declaratory Judgments, first edition for help on this question. At page 368, it is said:

> "Receivers likewise have frequent occasion to seek declarations that certain property is the property of the bankrupt, that gifts or assignments by the bankrupt are void or constitute fraudulent preferences, or that alleged incumbrances in favor of third persons are invalid."

The same text no doubt will be found in the second edition supported by the citation of many cases in the notes. Again, the latter part of Chapter XII of Borchard, First Edition, pages 586 to 589 is devoted to the subject of bankruptcy as related to the remedy by declaratory judgment process. Among other things it is said:

> "In bankruptcy, many specific questions arise which admit of ready adjudication by declaration. Most of them involve issues of titles to property * * * Most systems of law in commercial countries permit of the speedy adjudication of the issues which arise in the marshalling and distribution of the assets of an insolvent estate * * * The receiver not infrequently asserts against an adverse claimant to property or against the bankrupt's debtor that the property or debt is part of the bankrupt's estate and not the property of the adverse claimant."

The same pages also take up and discuss creditors' claims, bankrupt's claims and miscellaneous claims, and the chapter concludes with this sentence:

> "These are but examples of the numerous types of claims in bankruptcy which are susceptible of speedy adjudication by declaration."

It follows therefore that if it is held either in this case or in the Green case that the bankruptcy court was in duty

bound to investigate and make findings pursuant to the mandatory language of 11 U. S. C. A., Sec. 403(e) as to what assets would be available or rather what property would be subject to taxation for the purpose of liquidating the proposed refunding bonds then under the authorities above quoted this declaratory suit was the most appropriate place and means for making such inquiry and this case in such circumstances should have been retained as a part of or as an aid to the jurisdiction of the court in the bankruptcy composition proceeding. The foregoing authority clearly shows that where a receiver or a trustee has been appointed to aid in the administration of a bankrupt estate either the receiver or the trustee is perfectly free to utilize declaratory judgment procedure for testing the validity of adverse claims to parts of the estate. By the same token the adverse claimants should be permitted to invoke the same procedure for settling claims made on behalf of the bankrupt estate which may be in the nature of lien claims or some right to create a lien which would have the effect of clouding the property claimed by such adverse claimants. In any case the court sitting in bankruptcy cannot completely administer any bankrupt estate until all such adverse claims have been cleared up and determined. Otherwise no final dividend for creditors can be declared. Of course in a municipal bankruptcy case the law contemplates going no further than to work out a composition but even so, the court is charged with the same measure of responsibility in ascertaining available assets and in determining adverse claims to the end that the court may be able *advisedly* to pass upon and adjudge the fairness, equity and legality of any proposed plan of composition.

Conclusion.

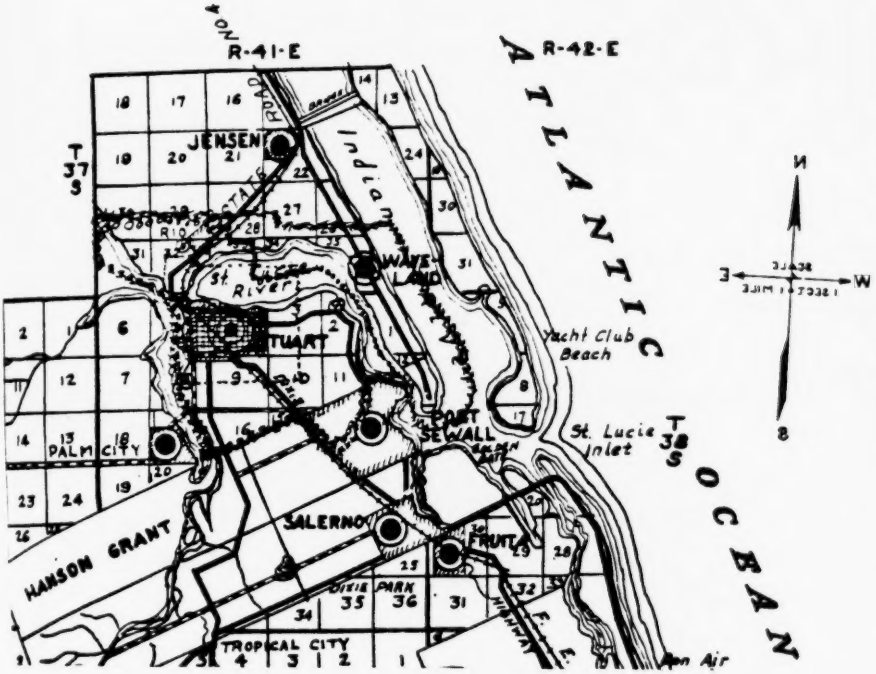
We now respectfully submit that the questions presented in this case are of great public importance not only for the purpose of a further authoritative construction and

application of the Federal Declaratory Judgment Act but also for a further authoritative construction and application of the municipal bankruptcy amendment to the Bankruptcy Act.

Respectfully submitted,

THOS. B. ADAMS,
1006 Bisbee Building,
Jacksonville, Florida,
Attorney for Petitioners.

CARROLL DUNSCOMBE,
Oughterson Building,
Stuart, Flordia,
Of Counsel.



The shaded portion - Sections 4 and 5 - Area, Chap. 7245, Acts 1915.

The xxxx line - Boundary, Chap. 11750, Acts 1925.

The oooo line - Boundary, Chap. 14408, Acts 1929.

The .... dotted line - Boundary, Chap. 15492, Acts 1931 and Chap. 16692, Acts 1933.